In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 185

DEANE-HILL COUNTRY CLUB, INC.,
A CORPORATION, PETITIONER

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals did not write an opinion. The memorandum opinion of the district court (Pet. Supp. App. 1–14) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1970. The petition for a writ of certiorari was filed on May 25, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a country club, constitutes an "enterprise engaged in commerce" within the meaning of Sections 3(r) and 3(s)(1) of the Fair Labor Standards Act.

STATUTE INVOLVED

The applicable statutory provisions of the Fair Labor Standards Act read in pertinent part, as follows:

> SEC. 3 [29 U.S.C. (Supp. V) 203]. As used in this Act—
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> * * * * *
>
> (r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor * * *.
>
> (s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
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> (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 * * * and beginning February 1, 1969, is an enterprise whose

annual gross volume of sales made or business done is not less than $250,000 * * *.

* * * * *

SEC. 13(a) [29 U.S.C. (Supp. V) 213]. The provisions of sections 6 and 7 shall not apply with respect to—

* * * * *

(2) any employee employed by any retail or service establishment * * * if * * * such establishment is not in an enterprise described in section 3(s) or such establishment has an annual dollar volume of sales which is less than $250,000 * * *.

STATEMENT

The Secretary of Labor brought this action against petitioner under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217) to enjoin violations of the minimum wage, overtime and recordkeeping provisions of the Act, and to restrain the continued nonpayment of minimum wage and overtime compensation due its employees. Petitioner denied that it was subject to the Act, claiming (1) that is was not a covered "enterprise" as defined in Sections 3(r) and 3(s)(1) of the Act, (2) that it was exempt as a "retail or service establishment" and (3) that, in any event, it had relied in good faith on a written administrative interpretation and therefore was relieved of liability by the Portal-to-Portal Act of 1947 (29 U.S.C. 259).

1. Petitioner, Deane-Hill Country Club, a Tennessee Corporation located in Knoxville, Tennessee, owns about 160 acres of land on which it operates a club-

house with complete dining and other facilities, an 18-hole golf course, a driving range, a swimming pool, and a pro shop and locker room for the golfers (A. 8–9, 57–58).[1] Golf carts are rented for use on the course by Country Clubs, Inc., a company whose stock is entirely held by the chief stockholder and managing director of Deane-Hill and his wife (A. 38–39; P. Ex. 4). Country Clubs, Inc., whose business activities are limited solely to the rental of carts to Deane-Hill golfers, has no regular employees of its own and utilizes Deane-Hill employees to rent and maintain the carts. The rental form that golfers execute specifies Deane-Hill as lessor. Country Clubs, Inc. pays no rent or utility bills to Deane-Hill. Fuel and spare parts for the carts are usually ordered and paid for initially by Deane-Hill (A. 42–46, 98).

The pro shop, which serves as the "control point" for the golf course, sells merchandise (A. 58–60), with all receipts being deposited into a separate "Deane-Hill Pro Shop account" (A. 92–93). The operating costs for the pro shop—rent, utility bills, telephone bills and wages of employees working in the pro shop—are paid by Deane-Hill (A. 72).

Deane-Hill regularly purchases goods both directly from out-of-state suppliers and from local suppliers of goods originating from out-of-state.[2] As found by

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[1] "A" references are to the Appendix Record before the court of appeals.

[2] During the period from April 1967 to April 1969, 246 separate shipments of goods were sent directly to Deane-Hill from outside Tennessee and deliveries of such goods took place practically every week (P. Ex. 14; A. 146–147). Deane-Hill's

the district court, petitioner has employees who "regularly order and receive merchandise shipped directly from out-of-state suppliers," as well as employees who also handle "regularly goods which although purchased locally have previously moved in interstate commerce" (Pet. Supp. App. 8).

In 1967 and 1968, Deane-Hill's gross sales volume (exclusive of receipts from pro shop sales of merchandise or golf cart rentals) was $497,762 and $539,999, respectively (A. 190–191, P. Exs. 6 and 10). Pro shop sales of merchandise for 1967 totaled $31,042 and golf cart rentals for that year brought in $35,386. Thus, the addition of either of the latter amounts would push petitioner's 1967 receipts over $500,000.

2. The district court held that Deane-Hill was subject to the Act's requirements as an "enterprise engaged in commerce" within the meaning of Sections 3(r) and 3(s)(1) of the Act. It rejected petitioner's argument that the golf cart and pro shop receipts could not be included in calculating the annual gross sales volume of the Deane-Hill enterprise, ruling that the rental of carts and sale of merchandise were related to the other activities of the country club (Pet. Supp. App. 7). Both petitioner's employees who regularly order and receive merchandise shipped directly from out-of-state suppliers and those employees who

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purchases from local suppliers of goods which originated outside the State included an average of 90 cases of beer a week at a cost totaling approximately $25,000 a year (A. 100–101, 111) and substantial quantities of food (A. 113–114, 118–121, 126–127). In addition, about 50 percent of the merchandise sold in the pro shop and most of the parts used in repairing the golf carts originated outside of Tennessee (A. 41, 78).

regularly handle goods purchased locally but which previously moved in interstate commerce were found by the court to be "engaged in commerce" within the meaning of Section 3(s) (Pet. Supp. App. 8–9). The district court also held that defendant was not exempt as a "retail or service establishment" under Section 13(a)(2), and that it did not have a "good faith" defense under the Portal-to-Portal Act of 1947 (Pet. Supp. App. 12–14).

The court of appeals affirmed in a brief order "for the reasons set forth in the memorandum opinion" of the district court (Pet. 9).

ARGUMENT

1. The clearly correct ruling below that all of the activities conducted at the country club constitute an "enterprise" within the meaning of Section 3(r) of the Act, accords with decisions of the courts of appeals of the Fifth, Eighth and Tenth Circuits finding related activities to constitute "enterprises" under circumstances where there was considerably less unity of control or integration of operations than here. See, *Shultz* v. *Mack Farland & Sons Roofing Co.*, 413 F.2d 1296, 1299–1302 (C.A. 5); *Wirtz* v. *Barnes Grocer Co.*, 398 F.2d 718, 721 (C.A. 8); *Wirtz* v. *First National Bank and Trust Co.*, 365 F.2d 641, 643–645 (C.A. 10).

2. The further ruling below that petitioner was an "enterprise engaged in commerce" because it had employees "engaged in commerce" within the meaning of Section 3(s) of the Act was also clearly correct. Both those employees ordering and receiving inter-

state shipments as well as those handling locally purchased goods which had originated in interstate commerce were plainly, in the words of Section 3(s) "employees engaged in commerce * * *, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person * * *."

In contesting this ruling, petitioner relies on the statement in *Maryland* v. *Wirtz*, 392 U.S. 183, 188, that the 1961 amendments to the Fair Labor Standards Act (which added Sections 3 (r) and (s) and adopted the "enterprise" concept of coverage) extended the coverage of the Act to certain additional employees, but did not enlarge the class of employers subject to coverage. As has been pointed out by the Second Circuit, in *Wirtz* v. *Melos Construction Corp.*, 408 F. 2d 626, 628, n. 5, however, the *Maryland* decision was concerned only with the validity of the "enterprise" approach of the 1961 amendments and did not address itself to the language of Section 3(s) which specifically defined "employees engaged in commerce" to include employees handling goods which had been moved in interstate commerce. The original Act had simply applied to "employees engaged in commerce" without the additional expanding language. To the extent that the phrase "engaged in commerce" was thus expanded in 1961, the class of employers subject to the Act was obviously affected. In any event, since petitioner has employees who meet either the original or the amended "commerce" test, its coverage by the Act is not open to question.

3. Petitioner's contention that its business is exempt from the Act as a "retail or service establishment" within the meaning of Section 13(a)(2) of the Act is without merit. Petitioner apparently relies on an interpretative bulletin of the Department of Labor to support this claimed exemption. The provision on which it relies, 29 C.F.R. 779.319, however, does not further its cause but explicitly states that an establishment "must be open to [the] general public" in order to qualify for the "retail or service establishment" exemption. See also the Opinion Letter No. 655, quoted in the court's opinion below (Pet. Supp. App. 12–13), which specifically states that the exemption does not apply to "country and town clubs * * * [which] are available only to a select group of persons who have been specially selected to club membership." Furthermore, even if petitioner's business had previously been within this exemption, the express language of the exemption, as amended in 1966 (80 Stat. 830, 833), limits its application to establishments having "an annual dollar volume of sales which is less than $250,000."

Because of the obvious inapplicability of both the Section 13(a)(2) exemption and the interpretative bulletin, petitioner's final claim that the good faith reliance provisions of the Portal-to-Portal Act of 1947 (29 U.S.C. 259) excuses its failure to comply with the wage and hour provisions of the Fair Labor Standards Act is frivolous.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1970.